

F2HJCEGC

Teleconference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

12 Cr. 876 VSB

6 PAUL CEGLIA, a/k/a
7 Sealed Defendant 1,

8 Defendant.

9

10 February 17, 2015
11 11:37 a.m.

12

13 Before:

14 HON. VERNON S. BRODERICK,

15 District Judge

16 APPEARANCES

17 PREET BHARARA,
18 United States Attorney for the
19 Southern District of New York
20 ALEXANDER JOSHUA WILSON,
21 JANIS ECHEBERG,
22 Assistant United States Attorneys

23 ROBERT ROSS FOGG,
24 Attorney for defendant Ceglia

25 GIBSON & DUNN,
26 Attorneys for Facebook, et al.
BY: ALEXANDER H. SOUTHWELL, Esq.
ORIN SNYDER, Esq.
Of counsel

F2HJCEGC

Teleconference

1 (Teleconference in Chambers)

2 THE COURT: Hi. This is Judge Broderick. I have a
3 Court Reporter here. This is Judge Broderick. Can you hear
4 me?

5 THE CLERK: Hold on!

6 THE COURT: Hi. This is Judge Broderick. Can you
7 hear me?8 MR. WILSON: Yes, Alexander Wilson and Janis
9 Echenberg.10 MR. FOGG: Your Honor, Mr. Ceglia waived his
11 appearance for this, Judge.12 MR. SNYDER: Your Honor, Orin Snyder with Alex
13 Southwell for Facebook and Mark Zuckerberg.

14 Good morning.

15 THE COURT: Good morning. First, I am here with a
16 Court Reporter. My Law Clerk Doug Lieb is here also.17 Let me review for the parties the materials that I
18 have in connection with today's hearing.19 A VOICE: If I may, you seem to be at a distance. I
20 am having trouble hearing on the phone.21 THE COURT: It is not the distance. It is the
22 government quality of phone. I am fairly close to the phone.
23 I will try to speak up.

24 A VOICE: You need to increase your budget.

25 THE COURT: Good luck!

F2HJCEGC

Teleconference

1 A VOICE: Yes.

2 THE COURT: I have the February 6th, 2015 letter from
3 Gibson Dunn with the various attachments. I have Mr. Fogg's
4 February 13th letter again with some attachments. I also have
5 Gibson Dunn's letter of February 16th. Is there anything that
6 I am missing?

7 A VOICE: Not for myself, Judge, other than the fact
8 your Honor has stated you did not want to have any surreplies
9 or replies. Therefore, I believe the 16th letter should be
10 disregarded.

11 THE COURT: I mean --

12 MR. SNYDER: Nevertheless, we are here.

13 THE COURT: Okay. So first, let me just review for
14 you some things, some things that I believe are not in dispute.

15 That is the first issue raised; in other words, that
16 subpoenas would be issued to Facebook and to Mr. Zuckerberg.
17 As I understand it, there is no dispute related to that still
18 remaining. Is that accurate, Mr. Southwell? And Mr. Snyder?

19 MR. SNYDER: Yes, your Honor.

20 THE COURT: Okay. So let me hear from Facebook's
21 counsel and then I'll hear from Mr. Fogg.

22 MR. SNYDER: This is Mr. Snyder. We appreciate the
23 court giving us the opportunity to be heard this morning. We
24 left the conference before your Honor with the court's clear
25 directive we meet and confer about the subpoenas, and we did so

F2HJCEGC

Teleconference

1 extensively in good faith.

2 We agreed to voluntarily produce the categories of
3 documents that we understood the defendant to be seeking, and
4 it turns out that the defendant, in fact, seems to be seeking a
5 broader category of materials than previously indicated in both
6 his subpoenas and representations to us and your Honor which I
7 will address in a moment.

8 The defendant rejected our offer in the
9 meet-and-confers, and we find ourselves before the court. The
10 primary difference between the parties right now concerns
11 Ceglia's third request which we believe is patently overbroad
12 under the controlling authority and Rule 17 (c). With respect
13 to the first two requests, we respectfully accept the
14 defendant's request for any and all agreements between the
15 parties. There is no substantive disagreement there.

16 We were prepared to accept the defendant's broad
17 definition of "agreements," but we have also explained, though,
18 that those two requests are effectively moot because Facebook
19 and Mr. Zuckerberg don't have any agreements, as the defendant
20 broadly defines them, other than the one they have already
21 provided to the defendant, that is, the authentic Street Fax
22 contract. We don't have anything to produce responsive to
23 those requests.

24 The heart of the dispute relates to the third request.
25 As the court will see, it appears the defendant is using the

F2HJCEGC

Teleconference

1 criminal discovery process to obtain evidence for ongoing civil
2 cases, and we believe that is a misuse of the criminal
3 discovery process. It is worse than a fishing expedition
4 because it is not just seeking broad categories of information
5 for use in a criminal case, but to use in at least two ongoing
6 civil matters.

7 What is telling is that the defendant cites to no case
8 law in support of a request of this nature. They just say we
9 want, we want, we want. We have laid out in our February 6th
10 letter that a request for all e-mails between a third party and
11 any other individual, even if those requests are limited to a
12 specific category of information or specific time-frame simply
13 fail to satisfy the specificity requirement in Rule 17 (c).

14 We cited your Honor to the Nixon case and to the Libby
15 case, and the Libby case is particularly illustrative because
16 there the defendants sought, like the defendant here, all
17 communications, but in that case it was been between any
18 employee of the New York Times and eight specific individuals.

19 There, like here, the defendant's request was about a
20 specific topic and it is for communications within a specific
21 time-frame, but the district court still denied the subpoena as
22 failing to satisfy the specificity requirement because the
23 third parties as to whom the subpoena in that case applied
24 comprised a multiplicity of individuals, many of whom it was
25 unknown would ever be witnesses in the case.

F2HJCEGC

Teleconference

Given the narrow confines of Rule 17 (c), the district court rejected that as nothing more than an improper fishing expedition. Here we have two aggravating factors:

One, the subpoena here is even more invasive and expansive than the one deemed a fishing expedition in Libby because the defendant is seeking all communications between Mr. Zuckerberg and any third party, not just a denominated third party. That lacks specificity, and worse, it is now clear he is using this Rule 17 subpoena to aid him in both an ongoing Second Circuit appeal, and then even more improperly, Mr. Messina, who I am not sure is counsel here any more or at all, I haven't seen his notice of appeal, but assuming he is still counsel to the defendant in this criminal case, is bizarrely representing a defendant in an ongoing civil malicious prosecution case pending across the street in the Supreme Court of New York, where Facebook and Mr. Zuckerberg have sued Mr. Argentieri and other lawyers and law firms for malicious prosecution all arising out of the bringing of a civil lawsuit.

Mr. Messina is representing one of the main defendants in that case, the original lawyer for Mr. Ceglia in a civil case, Paul Argentieri. What makes this bizarre, Mr. Argentieri may well be a witness in this criminal case. What is clear by recent actions taken by Mr. Messina, including petitioning the Second Circuit, he has an ulterior motive here in seeking invasive, broad discovery, in violation of Rule 17 (c).

F2HJCEGC

Teleconference

1 We think over-breadth and lack of specificity could be
2 addressed, and we tried to be constructive. We proposed to
3 Mr. Ceglia this third request be limited to all e-mails between
4 Mr. Zuckerberg and any person involved in any way with Mr.
5 Zuckerberg's relationship with Mr. Ceglia.

6 We spelled out and identified six people who I think
7 undisputed were the people on Mr. Ceglia's side who were at
8 Street Fax with whom Mr. Zuckerberg dealt, and our proposed
9 request included an individual named Jeff Kaven, K A V E N, and
10 your Honor may recall it was Mr. Kaven's August 18, 2003 e-mail
11 to Mr. Zuckerberg that was foundational to Mr. Ceglia's
12 December 17th request. We invited defense counsel to offer any
13 revisions to our proposal, add any names if our six denominated
14 names were not sufficient, but they rejected out-of-hand and
15 forced this dispute.

16 So the key thing here is we believe that the defendant
17 regards the discovery process in his criminal case and in civil
18 cases to be complementary, and he is now seeking in a criminal
19 case broad discovery of a civil nature that he wants to use in
20 his civil cases.

21 You'll recall, your Honor, Mr. Ceglia sought a
22 criminal bill of particulars in this Court to get more
23 information about the Page 1, Page 2 issue that he is fixated
24 on in the civil cases, and so we believe that both on its face
25 the subpoena is overbroad and lacks the requisite specificity

F2HJCEGC

Teleconference

1 and should be quashed for that reason alone.

2 Additionally, given the evidence that Mr. Messina and
3 the defendant are using Rule 17 and service of ongoing civil
4 litigations, we believe that provides another basis for
5 quashing or limiting the subpoena.

6 Finally, your Honor, the second issue here concerns
7 the type of communications that the defendant is now
8 requesting, and in his December 17th motion the defendant's
9 third request was for all e-mail communications with Mr.
10 Zuckerberg and any third party concerning Ceglia between a
11 specified time date, not to all communications.

12 As your Honor will recall, January 29th, on the eve of
13 the last hearing, the defense submitted a revised third request
14 which he didn't share with us. During the hearing your Honor
15 asked Mr. Foggs point blank whether the revised third request
16 was additive, A D D I T I V E, to the other report. Mr. Foggs
17 told the court the request was not additive, and he proceeded
18 to represent to your Honor, on Page 5, Lines 20 to 24 of the
19 transcript, the revised January 29th third request was
20 "significantly narrowed" from the December request such that
21 the attorneys for the government withdrew their objection to
22 the issuance of the proposed subpoena.

23 In fact, that is not the case. In fact, Mr. Foggs has
24 now told us his third request was actually seeking a far
25 broader category of communication and e-mails. He now wants

F2HJCEGC

Teleconference

1 all communications, and that was not narrowing. There is no
2 real way to understand the request was a narrowing when it
3 seeks by definition a far broader category of communications
4 than the December 17th request. We believe that all
5 communications between unlimited class of people, many of whom
6 definitionally are not identified, is just inappropriate under
7 Rule 17 (c).

8 Both based on the breadth of the subpoena and the
9 expansion of the subpoena from e-mails to communications, we
10 think that the subpoena is overbroad. To the extent the court
11 deems it appropriate to order issuance of the third subpoena
12 request in some fashion that strikes an appropriate balance
13 between Rule 17 and the case law, we respectfully submit that
14 it should reach only e-mail communications that the defendant
15 originally sought between Mr. Zuckerberg and the persons who
16 were actually involved in his relationship with Ceglia, the six
17 individuals. Seven individuals we denominated.

18 Thank your Honor. Obviously, we will answer any
19 questions.

20 THE COURT: Okay. As I understand the revision from
21 e-mail, I think it now reads, I think, electronic
22 communications.

23 MR. SNYDER: Yes, your Honor, that's correct.

24 THE COURT: And so, Mr. Fogg, I guess I have several
25 things I would like you to address.

F2HJCEGC

Teleconference

1 The first is use of any documents that are produced in
2 connection with this subpoena; in other words, this is for use
3 in the criminal case. I assume it will be subject, the
4 documents, or should be subject to the protective order that is
5 already in place in this case. If that is not the case -- and
6 it may not be because Facebook is not a party to that
7 agreement -- I think that the parties need to work out some
8 understanding because as I understand the other documents that
9 have been produced in this case, they have been produced in
10 connection with, you know, subject to the protective order.

11 First, Mr. Fogg, I would like you to address the use
12 of these documents.

13 Second, I would like to hear from you on this e-mail
14 versus electronic communication issue. I would like to hear
15 some from you on the more generalized third request; in other
16 words, that doesn't specifically list individuals but merely
17 says anyone who had communications relating to the agreements
18 between Mr. Zuckerberg and Mr. Ceglia.

19 Okay, I'll hear from you now.

20 MR. FOGG: Thank you, Judge.

21 The document use, Judge, that was your first issue you
22 wanted me to address, I am representing Mr. Ceglia on the
23 criminal case. I have represented Mr. Ceglia initially on the
24 injunction, where in Buffalo I sought an injunction, the
25 magistrate there, the district court there to enjoin the U.S.

F2HJCEGC

Teleconference

1 Attorneys from prosecuting.

2 Since the decision from Judge Arcara was to deny my
3 motion, subsequent to that I was hired as the criminal defense
4 attorney on this case, in which I was instructed from the
5 magistrate in Buffalo to bring my First Amendment issue before
6 your Honor, which we have.

7 As far as the civil case, I am not involved in the
8 civil case. As far as its use, my intended use is in the
9 criminal case only. As far as all of the other documents that
10 have been presented by the government, I believe Mr. Wilson and
11 Ms. Echenberg, we had a brief conversation with regard to use,
12 and I believe I think it would be fine with the government and
13 fine with the defense that it will be placed under the
14 protective order and follow the procedures are that are in
15 place. If it is to be used anywhere else or shared with anyone
16 else, we'll follow the procedures with regard to the same and
17 contact the government and make any applications to the
18 government. If there is a difference, we will make application
19 to the court. I don't have any objection with regard to that.

20 My position is that I've seen the actual expert
21 reports. I have read them. I have looked over them. I have
22 seen some reports from the government from previous. It
23 appears to me the contract is original. If that is the case,
24 Judge, then we go straight to the e-mail versus electronic
25 communication issue.

F2HJCEGC

Teleconference

1 Does that satisfy the court's question on the first
2 issue?

3 THE COURT: It does. Particularly you have no problem
4 with these documents being subject to the same sort of rules
5 that apply to the other documents that have been produced and
6 it will be produced pursuant to the protective order. That
7 does address my question. Go ahead.

8 MR. FOGG: I will go on to the second question, the
9 issue the court wanted me to address, e-mail versus electronic
10 communication. The problem that I have, your Honor, is that in
11 that one e-mail which came from the government marked
12 "Confidential Information," Mr. Zuckerberg specifically stated
13 any IM's. IM, meaning instant message, meaning he sent him an
14 instant message.

15 That is a different form of communication than e-mails
16 in and of themselves. For Gibson Dunn, Mr. Zuckerberg,
17 Facebook to want to restrict it to e-mails tells me something
18 that is far more telling than anything they've argued, is that
19 there may be some other electronic communications or other
20 communications that may be telling.

21 Now, if I believe that the contract is legitimate,
22 then as in every negotiation, as I stated in my previous letter
23 to the court, in this particular case Mr. Zuckerberg and
24 Mr. Ceglia came across negotiations. They talked, they
25 drafted, they drafted proposals. Now, agreements, a meeting of

F2HJCEGC

Teleconference

1 the minds, yeah, that is what we would like to have as well,
2 but the whole idea is that they're saying that never did they
3 discuss involvement of Facebook in the Street Fax issue.

4 Now, there was an agreement, there is no dispute
5 Mr. Ceglia and Zuckerberg came across an agreement with coding.
6 The coding used in this case is the same as Facebook. They
7 came across another agreement and discussed it further. Mr.
8 Zuckerberg discussed it along with other individuals.

9 As far as instant messages, that would have to be
10 included. As far as any written documents, I'd like to have
11 those as well. As far as all communications, well, they are
12 what they are. What we are looking for, Judge, is are these
13 communications, and this one particular e-mail, he specified
14 instant messages.

15 Why would that be a problem? That should not be a
16 problem. In fact, I do believe -- I am not too sure, but I
17 checked it with my clients, that attorneys for Zuckerberg and
18 Facebook have already done a search of 28 other devices and
19 they found information.

20 This is not too burdensome, not too onerous for them,
21 and they've already done searches, except they were instructing
22 their experts not to reveal that information, not to give a
23 report, and we have not received one.

24 What is really bad is that in the other cases which I
25 was not involved with, my client said he never saw this e-mail,

F2HJCEGC

Teleconference

1 and because of that fact, it was withheld. I looked at the
2 transcript, and in the transcript Mr. Snyder told the court --
3 and the court asked what is wrong with giving Mr. Ceglia these
4 copies that related to the agreements, any documents and
5 e-mailed mails related to the agreement? Mr. Snyder said there
6 is nothing wrong and we'll do that. However, they didn't do
7 that because this was never disclosed in that case.

8 Now, it is important to capture the communications
9 because in the communications, just as you see here, Mr.
10 Zuckerberg says that I have not seen Paul this pissed off since
11 Mr. Zuckerberg sent Paul a revised contract with all the
12 penalty provisions. So looking at the e-mail, Mr. Zuckerberg
13 drafted up another contract or the contract or whatever
14 contract, but he drafted the contract, changed provisions of a
15 previous contract and then sent it to Mr. Ceglia.

16 Now, Mr. Zuckerberg on another occasion had said that
17 he received the contract from Mr. Ceglia. What is surprising
18 is Mr. Orin Snyder said this is one and the same. Well, if
19 that is the case, if you believe the contract is not genuine,
20 then every document you should have should reflect that and
21 that would make it inculpatory.

22 As I reviewed the expert testimony, expert report, it
23 looks extremely authentic. If that is the case, there is
24 exculpatory information here. I would like it for this case.
25 As far as expanding past e-mails, to restrict it to e-mails is

F2HJCEGC

Teleconference

1 kind of foolish because in this particular e-mail there was a
2 different kind of communication used that he specified here.
3 So all electronic communications, and this is not a difficult
4 thing to do especially in this day and age.

5 THE COURT: That answered my question.

6 (Simultaneous voices)

7 THE COURT: First, Mr. Fogg, were you done?

8 MR. FOGG: With the second issue?

9 THE COURT: Were you done or was there more you wanted
10 to say? And then I will hear from Mr. Snyder.

11 MR. FOGG: There was the other issue, Judge, the third
12 request and the list of individuals.

13 With regard to that issue that the court wanted me to
14 review or at least to talk about, Judge, I did touch on it a
15 little bit in the previous answer, but in this particular case,
16 Judge, Mr. Zuckerberg had discussions with his co-founders, had
17 discussions with his key employees, had discussions with the
18 first president, and the first president was Sean Parker. He
19 even had discussions with investors and even his parents.

20 If this is the case, Judge, we can't limit it,
21 especially limit it to what Mr. Snyder has done. All Mr.
22 Snyder has done is say hey, look, we'll talk to Mr. Ceglia's
23 employees. If you look at another disclosure, Mr. Zuckerberg
24 had a profound disrespect for Mr. Ceglia, and that was
25 demonstrated in one of the e-mails he called him an idiot. Why

F2HJCEGC

Teleconference

1 would he talk to my client's employees? There is nothing to be
2 had there.

3 Now, to limit it to any individuals? This is not --
4 it would not be burdensome to them to seek this information.
5 These individuals may not be called to testify, but Mr.
6 Zuckerberg will be called to testify. These e-mails, whether
7 they're to a third person or not, they're statements Mr.
8 Zuckerberg has made in these e-mails, in these instant
9 messages, in these electronic communications, so it should not
10 be limited to any particular individual.

11 As far as this is important for us, it is important
12 because we say the contract's legitimate, authentic. There are
13 reports that say that. We believe Mr. Zuckerberg, who also
14 knows it to be legitimate, had made discussions, comments on
15 the terms and provisions and the coding which is exculpatory.

16 That is the basis for our request.

17 THE COURT: Okay.

18 MR. FOGG: Does that answer the court's questions with
19 regard to 1, 2 and 3?

20 THE COURT: It does. Mr. Snyder.

21 MR. SNYDER: May I be heard?

22 Mr. Fogg's argumentation just now I think underscores
23 perfectly why his expansive and expanding request for a broad
24 category of electronic communications is just entirely improper
25 under Rule 17 (c).

F2HJCEGC

Teleconference

Mr. Fogg's last comment where he speculates that Mr. Zuckerberg's discussions with investors and with co-founders and with employees must have somehow touched upon his client. He goes on to name Sean Parker illustratively, which is absurd. That wouldn't pass muster under Rule 26, under the liberal civil discovery standards. It certainly doesn't come close to Rule 17 (c).

The test, of course, is not merely burden. The test is under Rule 17 (c), Nixon and Libby and the other cases, whether it is specific, admissible and relevant, and the specificity requirement, of course, is a feather-piece of the legal standard, and specific in the context of Rule 17 (c) means far more than Mr. Fogg's random speculation that dozens or hundreds of investors and employees with whom Mr. Zuckerberg must have had communications may somehow touch on Mr. Ceglia.

Again that doesn't pass muster under 26, Rule 26 of the civil procedure. It doesn't even come close under Rule 17 (c). Mr. Foggs own verbiage I think inadvertently made that point. He used the word "may" repeatedly. He said these communications may be telling, these communications may show, I think they may indicate, they must.

That is just rank speculation and underscores why broad discovery into Mr. Zuckerberg's IM's or other communications with potentially hundreds of people is inappropriate, and not surprisingly, although given ample

F2HJCEGC

Teleconference

1 opportunity, Mr. Fogg has not cited a single case from this
2 circuit, this district or any other court where a criminal
3 defendant has been given this kind of expansive, invasive
4 discovery into all communications between a crime victim and
5 third parties based on speculation that there must be somehow
6 impeachment or exculpatory evidence in there. If that were the
7 case, he would be able to obtain, as he seems to want,
8 everything Mr. Zuckerberg wrote to anyone and call it a day.

9 I just to correct two things on the record. The
10 coding of Facebook does not resemble in any important,
11 material, significant or discernable way the so-called coding
12 of the Street Fax site, that I might add never became
13 operational and was an abject failure.

14 Secondly, I have one more correction of the record.
15 Mr. Fogg continues to misrepresent -- and I use that word
16 advisedly and thoughtfully -- of the discovery order in the
17 underlying civil case. He continues to say that the August
18 18th e-mail between Mark Zuckerberg and Mr. Kazin, K A Z I N,
19 was not produced to Ceglia in the civil case, and he faults us
20 for that and he creates the false impression somehow that was
21 improper.

22 In fact, as Mr. Fogg must know by now because we have
23 pointed it out in writing, if he was under a misapprehension
24 before that Facebook was only required by Magistrate Judge
25 Foschio, F O S C H I O, in the underlying civil case to produce

F2HJCEGC

Teleconference

1 certain correspondence between Mark Zuckerberg on the one hand
2 and Street Fax and people associated with Street Fax on the
3 other from Mr. Zuckerberg's Harvard e-mail account, that is the
4 July 1, 2011 order that is operative in that case. So I just
5 wanted to make sure that that correction was made.

6 So in sum, we have proposed what we believe is a
7 reasonable and appropriate narrowing of the third request that
8 would require Mr. Zuckerberg to produce e-mails between himself
9 on the one hand and people associated with Street Fax on the
10 other relating to Mr. Ceglia.

11 And we believe that we have agreed, obviously, to
12 comply with the subpoena on compulsory process and we believe
13 that that is an appropriate outcome here. Thank you again,
14 your Honor, for letting us be heard.

15 THE COURT: Sure.

16 MR. FOGG: Your Honor, if I may?

17 THE COURT: Just briefly, Mr. Fogg, because I am ready
18 to rule.

19 MR. FOGG: I understand, Judge, crime victim status
20 hasn't been granted, and that is number one. You already know
21 that. I sent that letter out.

22 Your Honor, there are issues with regard to this case.
23 Mr. Kazin had a conversation with Mr. Zuckerberg about an
24 agreement. This is what we're looking for. If there is no
25 agreement, as they say, then why the fight? Why the hide?

F2HJCEGC

Teleconference

1 The issue of whether or not Mr. Snyder told me what he
2 believed he meant to say or what the court said, that is not an
3 issue for me. That is not an issue for this criminal case.
4 The only problem I have is that if we're going to play hide the
5 ball under the cup, then I don't want to play the game.

6 The whole idea is I don't want to play with semantics
7 of wording where an officer goes and searches your house and
8 you say look, you don't need to compel to do it, I will allow
9 you to do it, but don't search this room. Why? Because there
10 is something in that room I don't want you to have.

11 That is the purpose of the subpoena. That is why we
12 are looking for it. It is specific, it is relevant and
13 material, Judge, and it is also admissible. As far as Libby,
14 yeah, we understand that. We meet those criteria. I have put
15 that out there.

16 As far as "may," I don't know what Zuckerberg has done
17 or what you're trying to hide. All I know is if you think this
18 is not a contract, then allow the subpoena to issue. The
19 reason why I wanted the subpoena to issue is because I didn't
20 believe we'd get what we want. I believe there will be playing
21 around, wordsmithing, and that is the reason I am asking for
22 this. It is, it is extremely specific, extremely relevant. I
23 am not looking for letters; I am looking for electronic
24 communications only because in that day and age, at that time
25 that is what the young folks did. Thank you.

F2HJCEGC

Teleconference

1 THE COURT: All right. This is what we are going to
2 do. I am going to authorize Mr. Ceglia's most recent proposed
3 17 (c) subpoenas, with certain modifications as they're
4 attached to Exhibit A of Mr. Fogg's February 13th letter. As I
5 mentioned, the one issue is already taken care of, the issue of
6 subpoenas issued to Facebook and Mark Zuckerberg.

7 Also Facebook has proposed some non-substantive edits
8 for clarity to the definition of "agreement." Because those
9 changes are non-substantive, by Facebook's own admission, they
10 do not alter the category of materials being subpoenaed and I
11 will not require that specific modification.

12 Now, the only substantive disagreement, as I
13 understand it and as the parties have indicated, is with regard
14 to Subparagraph 3. Mr. Ceglia seeks all electronic
15 communications from January 1, 2003 to July 29th, 2004 between
16 Mr. Zuckerberg and any person that relate or make reference to
17 agreements with Mr. Ceglia. Facebook consents in most
18 respects, but argues the request must be limited to Mr.
19 Zuckerberg's electronic communications, or I should say say
20 e-mails with six specific individuals.

21 I find Mr. Ceglia has demonstrated the relevance,
22 admissibility and specificity of materials he wishes to
23 subpoena under United States versus Nixon. Facebook does not
24 dispute the relevance of e-mail communications with Zuckerberg
25 and third parties, certainly the six they have identified with

F2HJCEGC

Teleconference

1 regard to Mr. Ceglia. Mr. Zuckerberg and Facebook dispute
2 whether Nixon's specificity and admissibility requirements have
3 been satisfied.

4 Now, Zuckerberg's electronic communications, and I
5 will -- with regard to whether it is e-mails or electronic
6 communications -- I will accept the electronic communications
7 because, as Mr. Fogg has pointed out, the reference was made to
8 IM messages I think in the e-mail which he referred to.

9 Now, Mr. Zuckerberg's electronic communications about
10 his agreement with Mr. Ceglia may be admissible for impeachment
11 if they contain inconsistent statements. They may also be
12 admissible on themselves if they discuss the actual contract at
13 issue. In fact, Facebook concedes Mr. Zuckerberg's
14 communications with several identified third parties who may or
15 may not be witnesses in this case would be admissible. His
16 communications with other third parties do not become
17 inadmissible merely because those third parties have not yet
18 been identified.

19 With regard to specificity, although the subpoena
20 seeks all electronic communications with all third parties, it
21 does so within a specific time-frame and with a highly limited
22 subject matter; in other words, the issue of the agreements.
23 In some circumstances, material that cannot be described fully
24 can still be properly subpoenaed as long as there is sufficient
25 likelihood it contains relevant and admissible information

F2HJCEGC

Teleconference

1 under Nixon.

2 Under the present circumstances, Mr. Ceglia cannot
3 reasonably be expected to describe the content of the
4 subpoenaed communications with more precision. Facebook relies
5 on United States versus Libby, but Libby, I find Libby to be
6 readily distinguishable. The only similarity between this case
7 and Libby is Mr. Ceglia seeks documents potentially involving a
8 multiplicity of third parties. However, the subpoena rejected
9 in Libby involved all communications by any employees -- excuse
10 me -- any employ of the New York Times with any eight third
11 parties, some of whom were non-witnesses. In addition, the
12 topic there was generally Joseph Wilson. Here the topic is
13 much more specific, in that it relates to agreements, and also
14 that it relates to communications with someone who is clearly
15 going to be a witness here.

16 As I mentioned, Mr. Zuckerberg is clearly going to be
17 a witness. Furthermore, all communications are specifically
18 related to the core subject matter of this prosecution, the
19 agreement between Mr. Zuckerberg and Mr. Ceglia. However, the
20 proposed subpoena is overly broad in that it seeks all
21 electronic communications no matter where they reside. This
22 language could improperly require Facebook to produce documents
23 outside of its custody or control. Therefore, Paragraph 3 of
24 the proposed subpoena shall be altered to read as follows:

25 "All electronic communications of Mr. Zuckerberg in

F2HJCEGC

Teleconference

1 your custody, possession or control, with their attachments,
2 between January 1st, 2003 and July 29th, 2004, that relate or
3 make reference to agreements no matter what forms in which they
4 exist."

5 So that is the ruling of the court. Is there anything
6 that requires additional clarity?

7 MR. FOGG: Nothing further, your Honor.

8 MR. SNYDER: No, your Honor. Thank you very much.

9 THE COURT: Okay.

10 MR. SNYDER: Did you want me to redraft the order or
11 the court will --

12 THE COURT: You should revise your subpoenas to be
13 consistent with what has been discussed here today.

14 MR. FOGG: I understand.

15 THE COURT: If it turns out there is some
16 disagreement, then you can come back to me. Hopefully, it is
17 clear enough what I've ruled.

18 MR. FOGG: Understand, Judge.

19 THE COURT: That concludes the first item that I
20 wanted to discuss.

21 The second item, Mr. Fogg, I have your letter with
22 regard to -- and Mr. Snyder and Mr. Southwell, we are about to
23 actually discuss a separate issue that arose with regard to
24 testing.

25 MR. SNYDER: We'll get off the phone. Thank you so

F2HJCEGC

Teleconference

1 much for your time.

2 MR. SOUTHWELL: Thank your Honor.

3 THE COURT: Take care.

4 So I have the government's letter of February 13th.

5 Is everybody still there?

6 MR. FOGG: Yes, your Honor.

7 THE COURT: I have the government's letter of February
8 13th and Mr. Fogg's response of February 16th as well as I also
9 printed out a copy of the discovery order on consent. I have
10 several questions, and then I'll hear briefly from the parties,
11 and then I have a suggestion for how we proceed going forward.

12 My first question is actually for the government with
13 regard to the discovery.

14 MR. FOGG: Your Honor, if I may?

15 THE COURT: Yes.

16 MR. FOGG: Can we dial back in?

17 Is that a possibility?

18 THE COURT: I guess we could. I am not sure why. I
19 thought I heard the parties from Facebook drop off. Quite
20 frankly, Mr. Fogg, let me finish. Even if they wanted to stay
21 on the phone, if we were in court, they would be entitled to be
22 there.

23 MR. FOGG: True.

24 THE COURT: Anybody, anybody would be. The simple
25 fact is that the expediency -- and really I decided to do this

F2HJCEGC

Teleconference

1 on the phone so I wouldn't require the parties to appear before
2 me personally.

3 MR. FOGG: Thank you.

4 THE COURT: They would be entitled to sit in the
5 courtroom and listen regardless, as would members of the
6 public. Again, I decided to have this conference on the phone
7 so that we can deal with it as expeditiously as possible.

8 MR. FOGG: I understand, Judge. That is fine. I
9 understand.

10 THE COURT: So I have the letter of February 13th, the
11 government's letter, and Mr. Fogg, your response with two
12 attachments.

13 MR. FOGG: Yes.

14 THE COURT: My question for the government relates to
15 the discovery order on consent because the discovery ordered
16 actually refers to the possibility of videotaping any testing
17 that might be done, and I guess when did the government become
18 aware that the Secret Service doesn't permit videotaping?

19 The second question is, is it the government's
20 position that the Secret Service, that their rules would
21 prevent me from ordering videotaping? I'll hear from you on
22 those issues.

23 A VOICE: (Unintelligible)

24 THE COURT: If you could, is that Mr. Wilson?

25 MR. WILSON: Yes, Mr. Wilson.

F2HJCEGC

Teleconference

1 THE COURT: Go ahead.

2 MR. WILSON: The government learned on February 9th
3 when we inquired, at defense counsel's request, about the
4 possibility of videotaping or them being present for the
5 testing of the lab personnel, and that is when we were told
6 that videotaping and personal presence during the testing
7 process was not permitted, but they could observe the taking of
8 the samples and the preliminaries through a glass in some
9 facility that the lab has.

10 As to the second question your Honor asked, I suppose
11 the first answer is your Honor obviously can order anything
12 you're inclined to do. I think both the policy and as a
13 practical matter the set-up simply may not permit it.

14 I don't know if you want me to address this, but more
15 to the point, it is not something the defense is entitled to
16 and it would not be appropriate to require in this instance,
17 and there has been no showing of any kind that it is warranted,
18 but that may be a secondary question your Honor has deferred.

19 As to whether it is physically possible, I don't think
20 we have the final answer. I suppose someone can bring a
21 camcorder in and do something. I don't know what their
22 position would be if you ordered it, whether they would want us
23 to do any more than that.

24 THE COURT: As I understand, the current position is
25 that representatives of the defense, Mr. Fogg and any -- I

F2HJCEGC

Teleconference

1 think it was up to five people --

2 MR. WILSON: Three, your Honor.

3 THE COURT: -- three people would be entitled to
4 observe from whatever viewing platform the Secret Service has
5 in connection with this laboratory. Is that accurate?

6 MR. WILSON: Yes, your Honor. Just to be clear, the
7 government's understanding, as reflected on the letter on
8 Friday, has been clarified slightly. Let me make sure we are
9 clear.

10 They will be able to be present to witness the taking
11 of samples, which is the destructive portion of the testing
12 here where the document is actually altered in any way by the
13 taking of these small samples.

14 In our letter we had expressed our understanding we
15 thought there would be no other need for them to be working
16 with the full document once the samples were taken. We tried
17 to confirm that on Friday and were unable to get a final
18 answer. We have now gotten one, which is that is not
19 necessarily true. There may be, depending on what they're able
20 to do once they see the document and can evaluate the exact
21 tests that are possible, certain tests which would involve
22 looking at the document itself, which would not be observed by
23 defense counsel and their representatives, but those would be
24 non-destructive tests, so they have no effect on the integrity
25 of the document. Obviously, the Secret Service will carefully

F2HJCEGC

Teleconference

1 document via photograph the state of the document at all stages
2 of the proceeding.

3 THE COURT: Okay.

4 MR. WILSON: That is not exactly what was in the
5 government's letter. I wanted to make sure there was no
6 misunderstanding on that point.

7 THE COURT: Mr. Fogg, I'll hear from you.

8 MR. FOGG: Judge, my question would be what testings
9 would be done. My major concern is yes, the destruction of the
10 contract. I believe there are very few samples that are left,
11 and that was put in my letter. That is the greatest concern
12 because then as far as any testing that defense may want to do
13 for the criminal case, we may be limited in our ability to
14 test.

15 The only thing I request is if we could at least
16 secure an expert to tell us, you know, what is the probability.
17 There may be two or three samples that may be left as far as
18 the signature or the ink. I would like to at least know this
19 before, beforehand so this way we're more aware of the issue.

20 One of the things that what I'd like to do is when
21 they take samples, I would like for us to be able to take
22 samples. I think that is kind of paramount. The destruction
23 issue is what we are looking to prevent here. I think that is
24 the major issue, Judge.

25 MR. WILSON: If I may briefly respond to one aspect of

F2HJCEGC

Teleconference

1 that?

2 THE COURT: Yes.

3 MR. WILSON: Your Honor, I think the issue from the
4 government's perspective is that the defendant has taken
5 samples of these very documents in connection with the civil
6 case and has had them reviewed by retained experts.

7 The defense has already had his opportunity to review
8 these things. The Facebook had the opportunity to review
9 these. It is the government that is the only relevant party
10 who hasn't had the opportunity to take samples. Certainly we
11 will take all possible steps depending on the amount of
12 available ink. I think, your Honor, it is just the ink. There
13 is plenty of toner and paper that can we samples without a
14 problem. I don't think the defense argues otherwise.

15 With respect to the various ink handwritten samples,
16 it is not clear to us at this point if there is enough ink for
17 the Secret Service to test. That is one of the things they're
18 going to need to evaluate once the document is in their hands.
19 They will certainly at our direction take all possible steps to
20 ensure that they take the minimum that they need to test and
21 leave anything available if the defense wants to do further
22 testing.

23 If there is only enough material left for one set of
24 tests, it is our view the government is entitled to do it.
25 They have had their opportunity. Mr. Fogg may know better than

F2HJCEGC

Teleconference

1 I whether they still have samples or whether they have, they
2 obviously have, if they used them, the results of the tests
3 they've already done.

4 One other thing that I would say, your Honor, even if
5 your Honor thinks that is an insufficient opportunity and even
6 if this was a live issue, it is one that can be addressed and
7 resolved once the testing has been done. If the defense thinks
8 they had a basis to argue that the evidence should be precluded
9 because they did not have a fair opportunity to conduct their
10 own tests, it seems to the government that that is a separate
11 issue to be addressed down the line.

12 In the first instance, there is either enough samples
13 to test once, twice or not, and if it is once, the government
14 should do it and the defense can make whatever arguments they
15 can make. There are no grounds to preclude us from doing our
16 testing because they may not be able to do the testing. At
17 best maybe -- I don't think there is a legal basis, but the
18 argument shouldn't be it shouldn't come in, not that the
19 government is entitled to know what the results of its test
20 would be.

21 THE COURT: This is what I am going to rule.

22 I think the government can go forward with the
23 testing. I would like the parties to meet and confer
24 concerning sort of the process and procedure. Mr. Fogg, the
25 government has indicated that yourself, and I don't know

F2HJCEGC

Teleconference

1 whether it is three additional or three total people from the
2 defense can view the destructive part of the testing.

3 If there are other aspects of the testing that you
4 want more information on, you should meet and confer over the
5 next week to get whatever information you think you need so
6 that you can communicate, if you have an expert, with your
7 expert concerning not only the destructive test, but whatever
8 other test might actually occur depending upon those initial,
9 those initial tests.

10 I think the issue for me is not whether or not the
11 government can do the testing. It is what the end result is
12 going to be, and that goes to, Mr. Wilson, your point that if
13 the defense has an application either because they feel they
14 haven't had adequate expert disclosure or because they were not
15 provided an opportunity because the destructive test didn't
16 allow, won't allow them to have any material left to test, that
17 is a separate issue. What I do with regard to that is a
18 separate issue.

19 I will raise this, and I want to make one thing
20 entirely clear. This testing is somewhat late in the day for a
21 case that was filed in 2012. We're going to trial in May, make
22 no mistake about it, we're going to trial. So I hope that the
23 testing is done quickly and is in the 30-day range rather than
24 the 60-day range. I am not making any indication one way or
25 the other how I might rule, depending whatever the testing

F2HJCEGC

Teleconference

1 results may be, but again my issue is I've got a trial, and we
2 are going to trial in May, and obviously the government
3 tomorrow, I believe, is to make expert disclosure. I assume,
4 depending upon the results of the test, that those disclosures
5 will be supplemented.

6 Now, is there anything else with regard to that? Am I
7 missing something or is something not clear?

8 MR. WILSON: I have one issue from the government's
9 perspective, your Honor. Certainly we are going to seek to
10 expedite these things beyond even the standard 30-day bottom of
11 their normal range, but just to clarify the meet-and-confer
12 process over the next week, of course, because time is an
13 issue, my understanding is that we can send down the document
14 and can, in consultation with the defense to ensure their
15 ability to attend, take the samples and begin that aspect of
16 the testing now?

17 And again I'll have a week before we do any of the
18 external -- "external" is the wrong word -- non-destructive
19 portion of the testing?

20 THE COURT: Yes, you can send the document to the
21 Secret Service lab, but I want you to meet and confer over the
22 next week so that Mr. Fogg has an understanding of both with
23 regard to the timing of the destructive test, but then you
24 mentioned that there might be some additional testing that will
25 be done outside of non-destructive testing. To the extent

F2HJCEGC

Teleconference

1 you're able to give Mr. Fogg some understanding of what that
2 testing may be so that he can consult with his expert and weigh
3 in, that is the only thing I was indicating.

4 MR. WILSON: This is probably me more than your Honor,
5 but just to be clear, the government's intention would be,
6 since DC has apparently opted to shut itself down because of a
7 little bit of snow today, we are going to be sending the
8 document down tomorrow and the lab will be able to take the
9 samples as early as tomorrow afternoon.

10 I take it that with a fair, good-faith consultation
11 with defense counsel, your Honor's not suggesting we need to
12 wait a week before we do that, so that the defense has an
13 opportunity to consult with their experts?

14 Are we allowed to go forward with that process with
15 fair accommodation to them being able to view it?

16 THE COURT: They need to be able to view it, that's
17 correct.

18 MR. WILSON: Fair enough, your Honor.

19 THE COURT: Is there anything else?

20 MR. FOGG: Your Honor, if I may?

21 THE COURT: Yes, Mr. Fogg.

22 MR. FOGG: So my understanding is that as of now, at
23 this present time, still February 18th is the date on which the
24 government is to provide a summary of the expert's proposed
25 testimony and reveal their experts. Is that still the date?

F2HJCEGC

Teleconference

1 THE COURT: Say that again. I am sorry. The 18th was
2 the date?

3 MR. FOGG: The 18th date for experts, Judge.

4 THE COURT: That's correct.

5 MR. FOGG: That has not changed?

6 My only concern, Judge, yes, Judge, we do have a trial
7 date. I am not looking to delay it. I would like to proceed
8 in a timely fashion. However, I do want time to formally
9 respond to avoid any heavy burden of meeting the new evidence
10 from their testing.

11 If we could limit it, the amount of days and not bring
12 in 60 because 60 will be two months from now, bring it to one
13 or less than one month before trial, so if we could have a
14 deadline or if the court could think of a way to have us
15 prevent that? And if so, Judge, we'll have to take that up on
16 a motion for preclusion, but I would rather not do that.

17 THE COURT: I am not going to, because I have no idea
18 how long this takes or doesn't take, and I have been told 30 to
19 60 days. If it happens shorter than that, great. If it
20 doesn't happen within that time-frame, well, there may be
21 consequences because of that.

22 MR. FOGG: I understand. There is nothing further
23 from me, Judge.

24 MR. WILSON: Your Honor, I have just one other issue.
25 My understanding is in the past, particularly since

F2HJCEGC

Teleconference

1 the earlier rulings on the subpoena involved the coverage of a
2 protective order, and Mr. Ceglia himself has in the past
3 represented he was not fully informed by his counsel about what
4 was and wasn't covered by it, I assume Mr. Fogg will fully
5 report to Mr. Ceglia on the contents of the call and the
6 Court's rulings. If we can have that confirmed on the record
7 so there is no question down the line Mr. Ceglia is aware what
8 was going on since he was not on the call today.

9 MR. FOGG: That is a great assumption, correct. That
10 is what I do for all my clients, and I will do it in this case
11 as well.

12 THE COURT: There is a Court Reporter here, so there
13 is a record of exactly what transpired.

14 Now, Mr. Fogg, with regard to the return date --

15 MR. FOGG: Yes, your Honor.

16 THE COURT: -- on the subpoenas, why don't you speak
17 with Facebook and see what makes the most sense, if you can
18 speak with them. Otherwise, I will just insert a date once you
19 have the subpoenas ready for my signature.

20 MR. FOGG: Yes, Judge. What I will do is send out an
21 e-mail requesting a suitable or preferable date, and I will
22 transfer that to the government and your Honor.

23 THE COURT: Okay. And also to Facebook because,
24 obviously, they are a responding party to the subpoena.

25 MR. FOGG: Yes.

F2HJCEGC

Teleconference

1 THE COURT: Is there anything else we need to deal
2 with?

3 MR. WILSON: Not for the government.

4 MR. FOGG: Not for Mr. Ceglia.

5 THE COURT: Okay. All right. Thank you very much for
6 getting on the call.

7 (Court adjourned)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25